Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

**No. 75-839**

ROBERT P. WHALEN, as Commissioner of Health of the State of New York,

*Appellant,*

—against—

RICHARD ROE, an Infant, by ROBERT ROE, his Parent; JOHN DOE, an Infant, by MARY DOE, his Parent; JAMES MOE, an Infant, by MICHAEL MOE, his Parent; JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER and EMPIRE STATE PHYSICIANS GUILD, INC.,

*Appellees,*

—and—

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

*Intervenor-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## APPELLEES' BRIEF

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In the

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ROBERT P. WHALEN, as Commissioner of the State of New York,

Appellant,

- against -

RICHARD ROE, et al.,

Appellees,

- and -

GEORGE PATIENT, et al.,

Intervenor-Appellees.

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On Appeal from the United States
District Court for the
Southern District of New York

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## APPELLEES' BRIEF

This brief is submitted on behalf of appellees George Patient, Martha Patient, Dr. Gerald Lustig and the American Federation of Physicians and Dentists, plaintiffs in the case of Whalen v. Patient consolidated with Whalen v. Roe below.

This is an action brought by a number of doctors and patients challenging the requirement of a state statute that the names of all patients receiving duly prescribed medically indicated ("Schedule II") drugs be reported to and centrally filed with the state. The Commissioner of the Department of Health appeals from a judgment of a three-judge District Court which limited one provision of a comprehensive state statute (New York Public Health Law §3300 et seq.) which regulated drug manufacture, distribution, research, dispensing and record-keeping. The District Court, reviewing the asserted need for the central reporting of all patient names, invalidated the requirement that the name appear on that copy of the prescription which was transmitted to the Department of Health in Albany. The District Court did not invalidate any part of the entire balance of the statute which remains intact.

## QUESTION PRESENTED

Where the trial court in reviewing a state statute requiring the central filing and computerization of the names of all patients receiving duly prescribed medically indicated drugs found after hearing extensive evidence that:



a) the centralized filing of names discouraged patients from using medically indicated drugs and the patients had suffered real harm including diminished effectiveness of treatment or increased pain; and

b) the state was able to monitor drug use and achieve the purposes contemplated by the statute without collecting the name of every patient,

did the trial court err in narrowing the state's system by invalidating the provision that patient names be included on the centrally filed form?

## STATEMENT OF CASE

### 1. Procedural History.

The Commissioner of Health of the State of New York appeals from a unanimous judgment of a three-judge federal District Court dated August 13, 1975, which declared unconstitutional and enjoined those provisions of the New York State Public Health Law (§§3331(b), 3332(2)(a) and 3333(4)) which required that the name and other identifying information of every patient prescribed Schedule II drugs (§3306) be filed centrally with the state. The Court's decision was reached only after the most extended consideration and review by that Court, the original District Court and the Second Circuit Court of Appeals.

This case began when two separate complaints were filed in March and April 1973. Plaintiffs in the initial action are four patients - three children, and an adult receiving duly prescribed Schedule II medication - as well as two doctors who prescribed these drugs. The second action was brought by two patients - a post-operative cancer patient and a person suffering from migraine headaches, both of whom received Schedule II medication - the doctor of one of these patients and a federation of physicians and dentists. After these two actions were consolidated, the State Department of Health moved to dismiss for want of a substantial federal question. In April 1973, after argument, the District Court, Judge Robert Carter, granted the state's motion. (357 F. Supp. 1217 (1973)).

In his opinion Judge Carter, the judge who also wrote the decision appealed from here, reviewed the legislative scheme and held -- without benefit of the extensive record later produced at trial -- that there was no substantial federal question in that the program was apparently designed to help effectuate the asserted state purpose and that the invasion of the doctor-patient relationship appeared minor.

On appeal the Second Circuit reversed, finding in a unanimous opinion by Judge Friendly that a substantial constitutional question had been raised by the complaint. It remanded the case for consideration by a three-judge Court. (480 F.2d 102 (1973)). However, the Second Circuit placed a heavy burden of proof on the plaintiffs. Recognizing that "New York has



advanced powerful arguments in support of the central filing of prescriptions," (52a) the Court remanded for a review of the question of the need for central filing including patients' names.

Thereafter, a three-judge Court was convened. In August 1973 the plaintiffs moved for a preliminary injunction and the defendants cross-moved to dismiss. Both motions were denied. In ruling on plaintiffs' motion, the three-judge Court had only the allegations made in the complaints and the initial affidavits. In its denial of plaintiffs' motion, the Court again stressed the requirement that plaintiffs prove that their rights to privacy had in fact been affected and that their consequent injuries were not justified by the state interest. (364 F. Supp. 536 (1573)).

The case was tried before this same three-judge District Court in December 1974. At trial the Court received in evidence plaintiffs' testimony, a lengthy stipulation of facts, depositions and exhibits. Based on the extensive record before it, the three-judge Court ruled unanimously in August 1975 that the reporting of names was an unconstitutional interference with the plaintiffs' right of privacy. (Jurisdictional Statement 13a (JS)) The Court enjoined such filing. The Court also ordered the expungement of past patient name records but stayed that portion of the order pending appeal.

Justice Marshall, on the state's motion to stay the judgment of the District Court pending appeal, refused after oral

argument to vacate the lower court injunction. He continued the stay of expungement.

2. Findings of Fact.

The three-judge Court's findings of facts were:

A. The Existence of a Massive Computerized System

The statute requires physicians prescribing Schedule II drugs to do so on triplicate forms, one of which is sent to the State Bureau of Controlled Substances Licensing (State Bureau). Included on the form are the name and address of the patient, the Drug Enforcement Administration (DEA) number of the prescribing physician, the date on which the prescription was issued, the name and the amount of the drug prescribed, the maximum daily dosage, the National Drug Code number, and numbers identifying the dispensing pharmacy. The State Bureau receives 100,000 such prescriptions per month (J.S. 4a), and with the help of nine clerks and 20 odd other personnel processes these prescriptions onto computer tapes. In the 20 months prior to the entry of judgment the state had received 2,000,000 prescriptions.

B. Clear Harm to Patients

Schedule II substances include a variety of drugs, all of which are recognized as having legitimate medical uses. These drugs are used to alleviate chronic pain associated with pre-operative and post-operative cancer conditions and with migraine



conditions as well as to treat such diseases as schizophrenic disorders, epilepsy, narcolepsy and childhood hyperkinesis. (Dr. Brody, 148a-153a). The Court found that as a result of the system patients had substantially changed their medical treatment. Several patients testified to their deep concern about stigmatization of their children who as a result of taking ritalin, a Schedule II drug used to treat hyperkenesis, would have a record of drug use kept by the state. (J.S. 6a) Several, such as Mary Doe, a plaintiff, felt compelled to remove their children from treatment.* Another plaintiff stopped taking medication and was

* She testified:

A. "I took him off the drug, even though the doctor advised me not to.

Q. What was the immediate effect on your son's conduct after you took him off the drug?

A. Well, he has no -- he had no control over himself. He did very poorly in school. He was left back. He lost a full year in school because of his inability to have a long term period of concentration in the classroom. He was disruptive. He was completely changed.

Q. Have you ever permitted him to use this drug again since the law was effective?

A. No, I haven't." (171a-172a)

forced to resume because there were no adequate substitutes. (J.S. 6a) George Patient, a post-operative cancer patient, went out of state to find the Schedule II drug he had used before the filing requirement existed when substitutes failed to help him mitigate pain. (J.S. 6a)

Four doctors testified that they felt compelled to inform patients of the listing and computerization of their names. The Court noted in its opinion that these doctors had all reported

> "a reaction of shock, fear and concern on the part of their patients on learning that their names would be sent to Albany and put on a computer." (J.S. 7a)*

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*One doctor testified to patient reactions to the filing requirement and to its interference with required medical treatment:

A. "Most of them are shocked, hurt. Some of them refuse the drugs and in some patients, the schizophrenics, we are reluctant to even advise the drugs because they are suspicious enough to begin with, and they get involved with this and they worsen the condition, and we try to avoid the use of these drugs in those particular patients...
Q. Now, you said that in certain cases, you have decided not to use the drugs because of the filing requirements?
A. Yes.
Q. And what cases are those, mainly?

(footnote cont'd on next page)



One doctor testified that he had a substantial number of patients who as a result of the system were refusing to take Schedule II drugs despite the fact that they were medically indicated. (181a) A second doctor testified that he refused to prescribe the drug in his private practice involving pre and post-operative cancer patients. (205a)

C. No Demonstration of State Need

The District Court recognized the substantial state interest in drug regulation:

---

A. Mainly the schizo-affected disorders who are prone to suspicion and to have me act as a putative arm of the Government in a situation like that provokes all kinds of anxiety, even delusions, and if we can avoid the use of drugs in that situation, we try to.
Q. And so those are situations where you found the drug was medically indicated but because of the filing requirements you didn't use the drug?
A. Yes, sir." (154a-155a)

> "The state seeks to deal with a well-recognized and prevalent evil -- the widespread proliferation of drug abuse. In seeking through the legislation before us to prevent the diversion of Schedule II drugs to illegal use, the state manifestly is performing a legitimate governmental function." (J.S. 7a)

The Court stressed its reluctance to interfere with that function. But based upon a showing that the inclusion of name on the centrally filed form provided the state with no useful information, the Court found that the regulation requiring the patient's name was needlessly broad. (J.S. 11a)

The lower Court found that the only purpose served by the inclusion of the patient's name was the identification and investigation of those receiving drugs from more than one doctor or those receiving more than a 30-day supply of drugs in that period.*

---

*The Court stated:

> "Indeed, admittedly the only purpose this information [patient's name] serves is to identify individual patients who without using an alias go from doctor to doctor to secure Schedule II drugs and those individuals who secure more than a 30-day supply in any single month...Overprescribing or dispensing, forgeries and thefts can be detected. Having the name of the person receiving the drugs on the state's form adds nothing." (J.S. 11a)



It was stipulated at the time of trial, twenty months after the filing requirement took effect, that only two such names had been discovered and both had been investigated. The Court found that "one investigation revealed a bona fide patient relationship. The other was still pending." (98a)

The Court, balancing the harm done to patients by the system requiring the filing of 2,000,000 prescriptions over 20 months with the meager results of that system, concluded that the comprehensive statutory scheme implementing regulations designed to control and monitor the quantities distributed was not aided by the inclusion of patient name.

> "The diminution of a constitutionally guaranteed freedom is too great a price to pay for such a small governmental yield." (J.S. 11a)

D. Leakage.

The Court did not reach the question of the security of the state's computer system, but the plaintiffs presented uncontradicted testimony of a computer expert that personnel checks were inadequate (334a), the turnover in temporary help was dangerous (334a), the physical security of the building nonexistent (338a), and the data security system unsophisticated. (341a-342a)

The state's only response to the plaintiffs' evidence about the system's lack of security was to introduce the deposition testimony of Mr. Joseph L.

Cannizaro, the director of the Bureau of Controlled Substances Licensing. Mr. Cannizaro admitted that there were no written procedures for processing printouts from the system (457a-459a), that he was unaware of the nature of employment background checks, if any, which were conducted on personnel employed by the data center (465a), that he did not know whether or not any personnel had criminal records (466a-469a), that of the 17 employees in the State Bureau "We may have five or six, possibly seven new ones," within the past year (471a), and that he did not know the background of temporary employees, the employment testing or processing for selecting them, or whether they had criminal records or not. (484a-486a)

In conclusion, the three-judge Court found that the state had not shown a need for the inclusion of patient names on the centrally filed prescription in view of the existence of detailed and extensive alternative regulations, that there was substantial injury caused to patients, and without reaching the question of security of the system, concluded that the gain to the state was not sufficient to justify the loss to the individual.

## SUMMARY OF ARGUMENT

The trial Court's ruling is a narrow one which restricted one provision of the statutory scheme which was held to interfere with the individual's anonymity and the individual's right to medical care without scrutiny of the state. The Court left intact broad, comprehensive regulations.



This holding resulted from factual conclusions that:

a) this sweeping regulation, requiring the filing of 100,000 prescriptions a month, had caused a change in legitimate medically indicated treatment, had created real, harmful patient fears;

b) the state was able to achieve its legislative goals of reducing over-prescribing and detecting forged prescriptions without the inclusion of name on the form sent to the state;

c) the inclusion of name added nothing to the state program.

The doctor-patient relationship and the patient's expectations of anonymity fall well within the scope of the constitutionally protected right to privacy as defined by this Court. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Planned Parenthood v. Danforth, 44 L.W. 5197 (1976)

The recent cases of this Court relied upon by Appellant, Fisher v. U.S., U.S. , 96 S.Ct. 1569 (1976) U.S. v. Miller U.S. , 96 S.Ct. 1619 (1976) involve facts in which either the right of privacy was recognized, but found outweighed by a compelling state interest or matters dealing with financial papers not within the protected zone of privacy. They are easily distinguished from this case in which the interest to be protected involves intimate and personal concerns of medical care and

treatment and the right to confidentiality in the physician-patient relationship.

This Court should apply a standard of strict scrutiny, long established and reaffirmed in Danforth, supra, to the present facts. However, no matter what standard of review is applied, the state's requirement of the centralized filing of patient names cannot be upheld. The facts presented at trial show that the statute creates injury to patients while not aiding the state to achieve its intended purposes.



## ARGUMENT

## I

## THE DISTRICT COURT HOLDING IS A NARROW ONE FOUNDED ON THE FACTS OF STATE INTERFERENCE WITH THE DOCTOR-PATIENT RELATIONSHIP AND WITH THE LEGITIMATE EXPECTATION OF PATIENT ANONYMITY, TOGETHER WITH A FINDING THAT THE REQUIREMENT DID NOT AID THE STATE IN ACHIEVING ITS PURPOSES.

In reviewing the District Court holding it is essential to focus precisely upon what the Court did and did not do.

Most importantly, the decision below was reached only after trial. The thrust of the holding was not a broad one striking down an entire statutory scheme but a narrow ruling based on the facts in the record at trial and directed toward one specific abuse within the statutory scheme. The Court had declined to enter into broad rulings of law and left intact the legislative scheme almost in its entirety.*

---

* Schedule II drugs will still be prescribed only on triplicate forms issued by the Health Department. The form will still have to be purchased from the state, be numbered and be recorded as having been sold to that doctor. A copy of the form, with

(footnote cont'd on next page)

The holding did not restrict the state's ability to license the manufacture and distribution of controlled substances. §3310 et seq. It does not narrow state supervision of research. §3324 et seq. It does not reject the state classification of drugs. § 3306. It does not prohibit the use of "an official New York prescription" §3332 and §3333. It does not question the requirement that the doctor, pharmacist, and state keep the prescriptions for five years. §§3332, 3333, 3370.

Similarly the holding does not prevent the filing of the names of persons centrally in programs in which the state shows a function for that filing. (Vital statistics, for example.) The holding does not prohibit oversight by the state of the doctor-patient relationship where the method used can achieve a legitimate state purpose. The opinion leaves the state free to have the most thorough and intense regulation of drugs imaginable including the use of codes and numbers, doctor reporting and so forth as long as the state refrains from collecting and computerizing the

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the patient name, will be kept by the doctor and the pharmacist for a five-year period. The form will be forwarded to Albany with information as to the drug prescribed, the daily dosage and frequency of use and the doctor prescribing. The state can trace the prescription both to the doctor and pharmacy, can quickly review the prescribing practices of each doctor, his reliance upon particular drugs and the quantities of drugs used.



names of all patients receiving Schedule II drugs.

The holding is based on facts found at trial: (1) harm to patients resulting from diminished effectiveness in and changes of treatment and fears of stigmatization; (2) a vast state system which uses a dragnet more likely to expose the names of patients seeking drugs for legitimate medically indicated use than those obtaining drugs for illicit purposes.

The trial court examined other supposed needs for the centralized filing of names, such as detecting forged prescriptions, but found that

> "Indeed, admittedly the only purpose this information serves is to identify individual patient who without using an alias go from doctor to doctor to secure Schedule II drugs and those individuals who secure more than a 30-day supply in any single month. (J.S. 11a)

The Court found that the state prescription forms are serially numbered and sold to doctors. Each doctor and pharmacist has a DEA number. Each prescription is readily identifiable. "Over-prescribing or dispensing, forgeries and thefts can be detected." (J.S. 11a) In view of this record the Court understandably concluded that the inclusion of patient names adds nothing to the state system and the infringement of patients' privacy was unjustified."

Appellant relies heavily on "facts" not presented at trial which are said to provide a rationale for the inclusion of patient name on the centrally filed prescription. The foremost of these "facts" is found in a footnote on page 9 of appellant's brief:

> "In the September 1975 printout, the last before the judgment appealed from brought use of filed prescriptions to an effective halt, 45 reports were made (in one month). These involved patients using the same name to obtain controlled drugs (Schedule II) from multiple sources (doctor-to-doctor). Included also were prescribing over 30-day supply of a drug and use of forged or stolen prescriptions."

A parsing of that footnote shows rather that appellant seeks to mislead this Court. First, there was no showing at trial that "forged or stolen prescriptions" were in any way turned up from the printout of patient names -- rather the contrary. The footnote is similarly devoid of any indication of the connection between the inclusion of patient name and the detection of forgery, nor does it indicate how many of the "45 reports" related to these categories.

Secondly, the footnote states that these "45 reports" includes "prescribing over a 30-day supply." Such prescribing



hardly raises even a presumption of illegality or irregularity.* Suppose, for example, that a doctor originally prescribed a dosage of two milligrams per day to a particular patient, and that he prescribed 60 milligrams (a 30-day supply) to that patient, and suppose that thereafter, for whatever reason, the doctor decides that a heavier dosage is necessary, and he then prescribes more. Under these circumstances, the patient receives "over a 30-day supply." How many of these reports are included among the 45?

This leaves the last category -- persons using the same name who receive drugs from more than one doctor. After 20 months and 2,000,000 prescriptions, not one single case of illegality is cited by the state. Rather the state includes in a footnote an undifferentiated number (45) of reports, lumping common lawful practices (over a 30-day supply with illegal practices (forged prescriptions) (which the inclusion of name does not detect) to justify its massive reporting system.

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* §3331(5) is the provision relating to 30-day supply:

> "No more than a thirty day supply or, pursuant to regulations of the commissioner enumerating conditions warranting specified greater supplies, no more than a three month supply of a Schedule II, III or IV substance, as determined by the directed dosage and frequency of dosage, may be dispensed by an authorized practitioner at one time."

The State of California, in its Amicus brief, also in a footnote, reports 140 investigations in 1974 and 176 in 1975. (Amicus brief p. 8) Yet it does not differentiate among the many kinds of investigations nor give any of the results. The rationale provided by Amicus is similarly misleading. Without names, they say, a doctor could prescribe for himself and use a fictitious name which would go undetected. Yet the use of a fictitious name will not be detected by the computer. The computer does not recognize fictitious names, but only those names which repeat with more than one doctor, or those names receiving more than a 30-day supply.*

The District Court twice, on the initial motion to dismiss and on the appellee's motion for a preliminary injunction, was confronted by the reasoning advanced in both the appellant's and Amicus' brief and in each instance in the preliminary

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* See testimony of Cannizzaro: (Head of State Bureau)
  Q. There is only one of these printouts which contains a patient name, is that correct?
  A. That is correct, sir...
  Q. What is the purpose of showing the patient's name on that?
  A. It identifies a patient who has received in excess of a 30-day supply of a Schedule II controlled substance, either from one or more than one practitioner. (415a)



stage found the reasoning plausible. But at trial, where the rationale was confronted in the context of the evidence, reduced to testimony and examined, the rationale failed. The inclusion of patient name on the centrally filed prescription does not reveal the use of fictitious names. Names do not reveal forgeries. In fact there is no showing that the use of a fictitious name would even trigger a response from the system.

The holding below was, thus, a narrow one compelled by the facts in the record. The Trial Court's careful conclusions resulting from that record should be sustained.

II

## THE INDIVIDUAL'S NEED TO RECEIVE MEDICAL CARE AND ADVICE FROM HIS PHYSICIAN, AND HIS RIGHT TO ANONYMITY WITHIN THE DOCTOR-PATIENT RELATIONSHIP, ARE INTERESTS WHICH FALL SQUARELY WITHIN THE CONSTITUTIONALLY PROTECTED RIGHT OF PRIVACY

This case raises directly the question whether a state may systematically intrude into the physician-patient relationship by requiring the massive filing and computerization of the names of all patients who use duly prescribed legal drugs without a showing that such a requirement serves a legitimate governmental function. The challenged provision establishes, in effect, a centralized state registration of Schedule II drug users. Appellees respectfully submit that this violates their constitutional right of privacy.

Some plaintiff-appellees are patients receiving medical treatment for terminal cancer, migraine headaches or psychological conditions of differing natures. Other plaintiff-appellees are parents of children who are receiving a medically-indicated lawful drug (ritalin) to help them overcome the handicap of hyperkenisis. These appellees seek medical care and treatment



with the expectation and need to consult with their physicians in an atmosphere of confidentiality and security, with the knowledge that the decisions they make and the treatment they obtain will not automatically and systematically be scrutinized by the state government. The medical problems on which they consult their physicians are among the most intimate and personal concerns of the individual. Their subject matter falls well within the constitutionally protected zone of privacy.*

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*Justice Blackmun in Roe v. Wade, 410 U.S. 113, 153 (1973) traced the development of the broad right of privacy:

> "back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 200, 251 (1891) the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."

This line extends through Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (education of one's children); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (choice of schools for children); Skinner v. Oklahoma, 316 U.S. 535, 541 (1943) (sterilization); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (education of children), to the more recent cases of Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (contraception); and Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973) and more recently Planned Parenthood v. Danforth, 44 L.W. 5197 (1976).

As enunciated by this Court, the scope of the right of privacy extends to those areas of individual conduct that are most intimate and personal, and in which the individual, as a result, expects to be let alone. Medical treatment and the care of one's body clearly fall squarely within any view of intimate human concerns. Our society has always afforded confidentiality to the doctor-patient relationship.* Clearly a medical patient has always had an expectation of privacy. At trial below, the appellee-patients testified to their

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* The tradition of confidentiality extends back at least to the Hippocratic Oath:

> "Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret."

As quoted in "Physician's Tort Liability ... For Unauthorized Disclosure ...," 20 ALR 3d 1109, 1113.



own expectations of freedom from the intrusion of the state.* The four doctors who testified also substantiated the patients' reactions which included fear or shock, and more significantly the withdrawal from medically indicated treatment. (154a-155a, 181a, 188a)

Judge Friendly writing for the Second Circuit in this matter noted the patient's desire for privacy:

> "It is immaterial that the ailment is usually not one that should arouse any emotion toward the victim save sympathy; most people simply do not want their ailments to be generally known." (Footnote 480 F.2d at 108).

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* One parent of a child testified that he had trouble accepting that the legislation could be as it was described.

> "I protested strongly. I was very upset, which I expressed to him, [the doctor] and I told him that I had trouble accepting that the legislation would be as he described it, given the fact that the child was getting normal treatment for a known medical disorder and this was the customary treatment for it. (117a)

The right of privacy, extends to those areas of conduct where the individual expects and has reason to expect privacy. In the words of Justice Harlan:

> "My understanding of the rule... is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." Katz v. United States, 389 U.S. 347, 360 (1967) (concurring opinion).

This Court has recognized the protection of the individual's right to privacy in connection with the right to medical care and treatment and the right of the individual to receive medical advice from his physician free from state intrusion. In Eisenstadt v. Baird, 405 U.S. 348, 454 (1972) this Court recognized a right to access to contraceptive devices:

> "If the right of privacy means anything it is the right of individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child".

The right to seek medical care free from state intrusion was most explicitly articulated in the decisions of Doe v. Bolton, 410 U.S. 179 (1973) and Roe v. Wade, 410 U.S. 113 (1973).



In Doe, this Court spoke of "the woman's right to receive medical care in accordance with a licensed physician's best judgment and the physician's right to administer it..." (at 198).

Similarly, in Roe, Justice Blackmun spoke of the right of the doctor to administer care free of state interference:

> "The decision [in this case] vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available." (at 165-166)

This Court reaffirmed these holdings in Planned Parenthood v. Danforth, 44 L.W. 5197 (1976). That holding should resolve any doubt that state regulations concerning medical records fall within the zone of the constitutionality protected right of privacy. There the challenge, in part, was to requirement that medical facilities and physicians compile "relevant maternal health and life data". (at 5205) There

was no requirement that any data be filed centrally. While this Court upheld the statute, it described the statute, which unquestionably was far more carefully drawn than the sweeping New York law involved here, as "perhaps approaching permissible [constitutional] limits" (at 5205). Apart from the question of the applicable standard for review, to be discussed infra, Danforth makes clear that state laws that require the compilation of the medical records of individual citizens fall well within the scope of the constitutionally protected right of privacy.

The claim of the expectation of privacy does not rest alone in the doctor-patient relationship but also on the expectation of anonymity that the citizen expects from the state in matters of personal nature. Again, this Court has been most careful to protect individual anonymity where compelled identification will tend to discourage lawful activity. Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960); NAACP v. Alabama, 357 U.S. 449, 462, (1958).

Appellant argues in his brief (pp 14-21) that there is no right of privacy in the right to receive medical care and advice from one's physician within the doctor-patient relationship, nor in the need for anonymity connected with medical treatment. For this he relies upon recent holdings of this Court. Fisher v. United States, U.S. , 96 S.Ct. 1569 (1976), United States v. Miller, , U.S. , 96 S. Ct. 1619 (1976). Yet these cases involved the use



of subpoenas to enforce criminal statutes, where the interests of the state were demonstrably compelling and the scope of the required production was narrow. In each case the government sought financial records of an individual it suspected of criminal tax violation.*

Indeed, the reliance upon Fisher is totally misplaced. There this Court upheld an Internal Revenue Service summons of records relating to a taxpayer which were in the physical possession of the taxpayer's lawyer. Contrary to appellant's contention, Justice White, writing for the Court, did not reject the contention that an individual's privacy was involved but rather stated:

> "...the Court has never suggested that every invasion of privacy violated the privilege."[against self incrimination] (at 1575)

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* The recent holding in Andresen v. Maryland, 44 L.W. 5125 (1976) similarly involves the enforcement of a criminal statute, in that case by search warrant. The search warrant avoided any Fourth Amendment problem. The Fifth Amendment protection of privacy was recognized but was not violated as the state need was compelling. (at 5129, 5130, relying upon Fisher, supra).

Similarly, Justice Brennan, in his concurrence, pointed out that the Fifth Amendment cases relied upon by the majority which permit an invasion of privacy to so not because privacy is not involved but because the right of privacy is not absolute (at 1584). In Fisher, the enforcement basis for sustaining the subpoena.*

Appellant also relies on Association of American Physicians & Surgeons v. Weinberger, 395 F. Supp. 125 (N.D. Ill. 1975), affd sub nom. Association of Physicians & Surgeons v. Matthews, U.S. , 46 L. Ed.2d 229, 96 S.Ct. 388, upholding regulations permitting review of medical treatment records prior to federal payment for services. The challenge was to the statute on its face, with no record of injury to anyone including patients. The District

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* Fisher would indeed have been analogous to the present case if all attorneys were requested to file client's names, addresses and levels of income (with appropriate corresponding papers) for all clients having income above $30,000. The sweep of such regulation would surely raise not only an issue of the right to privacy, but presumably would be found to be an excessive intrusion into personal liberty.



Court did not hold in that matter that there was no right of privacy, as appellant implies (Brief, pp. 19-20). Rather, the Court found that the right gave way to a legitimate (and obvious) state purpose, protecting the public purse. In fact, the Court noted that the federal statute

> "provides that reporting procedures should utilize to the greatest extent possible 'methods of coding which will provide maximum confidentiality as to patient identity and assure objective evaluation consistent with the purposes of this part.' 42 U.S.C. §1320C-4" (at 135)

The holding in Kelley v. Johnson, U.S. , 96 S.Ct. 1440 (1976), also cited by appellant (Brief p. 19), in which this Court upheld a county regulation governing the hair grooming of policemen, similarly is not applicable here. The expectation of privacy connected with the right of a policeman to have hair of any length is limited indeed. Citizens and policemen expect supervision of dress and appearance for public employees. Patients, however, expect privacy when visiting a doctor.

These plaintiffs were not engaged in business, nor were they the subject of a criminal investigation. They are not trying to suppress financial documents relating to business activities where the state had probable cause to believe a crime was committed. Nor are they public employees.

These are medical patients - a post-operative cancer patient, a patient suffering from encephalitis, and parents of children receiving a drug to increase their attention span. These are persons who are seeking treatment for physical and psychological disorders. These patients are confronted by a sweeping state requirement compelling the massive centralized filing of the names of hundreds of thousands of patients per year.

Appellees submit that this systematic intrusion into the physician-patient relationship unquestionably implicates their constitutionally protected right of privacy as enunciated by this Court.



## III

## BY WHATEVER STANDARD OF REVIEW THE REQUIREMENT OF CENTRALIZED FILING OF PATIENTS' NAMES FAILS TO FULFILL ANY STATE PURPOSE, IS OVERBROAD AND UNREASONABLE AND CANNOT BE SUSTAINED

Appellees recognize that the right of privacy is not absolute. Once the right has been found to apply, the Court must review the requirement which intrudes upon the right to determine if the intrusion is justified.

The appellees urge a standard of strict scrutiny to review of this statute. This is the standard affirmed by this Court in Roe v. Wade, 410 U.S. 113 (1973) and reaffirmed in Planned Parenthood v. Danforth, 44 L.W. 5197 (1976)*.

*See Roe v. Wade, 410 U.S. 113, 155:
"Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' Kramer v. Union Free School District, 395 U.S. 621, 627, 89 S.Ct. 1886, 1890, 23 L.Ed2d 583 (1969); Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969); Sherbert v. Verner, 374 U.S.

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There can be no doubt that in applying this standard to the New York statute it cannot be sustained. First, the statute has created significant injury to patients, fear, and resulting change of medical treatment cited throughout this brief.* This burden placed upon the right to treatment is the element of injury which this Court, per Justice Blackmun, found lacking in Planned Parenthood v. Danforth, 44 L.W. 5197, 5206 (1976) where the Court sustained the record-keeping requirement.

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398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed. 2d 965 (1963), narrowly drawn to express only the legitimate state interests at stake. Griswold v. Connecticut, 381 U.S., at 485, 85 S.Ct., at 1682; Aptheker v. Secretary of State, 378 U.S. 500, 508, 84 S.Ct. 1659, 1664, 12 L.Ed. 2d 992 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307-308, see Eisenstadt v. Baird, 405 U.S., at 460, 463-464, 92 S.Ct., at 1042, 1043-1044 (White, J., concurring in result)."

*This brief has not dealt directly with the issue of plaintiff-appellees' standing. In part this is because the other appellees' brief does so. But, more importantly, the issue of standing is settled by the fact of clear injury to the plaintiffs as testified to by the patients at trial. Testimony showed altered medical treatment, children withdrawn from medically indicated drugs. By the standards of this Court in Baker v. Carr, 369 U.S. 186 (1962).

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The Missouri statute was found to have resulted in "no legally significant impact or consequence on the abortion decision or

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these plaintiff-appellees are persons who have a personal stake in the outcome sufficient to assure a sharpened presentation of the issue.

The doctor-plaintiffs would similarly appear to fall well within the standing standard of Singleton v. Wulff, 44 L.W. 5213 (1976). One doctor testified that he had given up prescribing Schedule II drugs (205a). The others all stated that the requirement affected their practice. These doctors have a financial stake in the outcome, and as in Wulff, they may be permitted to assert their patients' right of privacy.

In fact Judge Friendly in his opinion in this case had little trouble with the standing issue even for the physicians: "The standing of the physicians seems to be established by Griswold v. Connecticut, 381 U.S. 479 (1965) and Doe v. Bolton, 410 U.S. 179 (1973)"480 F.2d at 107 (Footnote).

These plaintiffs are not like those in Laird v. Tatum, 408 U.S. 1, 13-14 (1972) (cited by appellant at 46). Those plaintiffs did not change their circumstances, nor suffer injury of any kind. The patient-plaintiffs have standing because they are (without choice) involved in a relationship with their doctor upon which the challenged regulation intrudes directly. Their names and a record of their treatment are forwarded to the State Department of Health. They are directly subject to the state statute.

on the physician-patient relationship." (5206) Furthermore, the Missouri statute in Danforth required no centralized reporting, the most intrusive element of the statute here. The Missouri statute was also found to be "reasonably directed to the preservation of maternal health...," (at 5205) unlike the provision here. Even so Justice Blackmun found that the regulation "perhaps" approached "permissible limits." With these three factors - burden on the relationship, centralized filing, and no connection to patient health - the New York statute goes clearly beyond permissible constitutional limits.

Furthermore, the requirement of patient name is not narrowly drawn to achieve only the intended purpose without offending the individual's right. The statute, as left intact by the decision of the three-judge Court, requires both the doctor and the pharmacist to maintain copies of the prescription with the patient name for 5 years. (PHL §§3332, 3333). The third copy sent to the state could easily substitute a coded number for the patient's name.*

*Parallel Federal law, 21 U.S.C. §829, which provides explicitly for "Schedule II" prescriptions, and which requires that all such drugs be dispensed by written prescription, does not require the centralized filing of prescriptions.



Furthermore, while the three-judge Court did not reach the issue of security, there is no doubt that the filing and processing of more than 1 million prescriptions per year into a computerized system poses a danger to every person named. (Can it be doubted that athletes, celebrities, politicians and perhaps even judges may well be tempted to substitute other's names to avoid identification?*) Although security problems are self-evident, the record shows that the head of the enforcement branch of the Department was unaware of the nature of employment checks (465a ), did not know whether employees had criminal records (466a-469a) and admitted to having "possibly" seven new employees in the past year out of a total of 17 (471a). The check on temporary help was even more uncertain (481a-486a).

Appellant argued below that the present system of massive systematic centralized filing imposed no greater burden on the doctor-patient relationship than existed under the previous system which is involved under the no centralized filing of prescriptions whatever. The Court below rejected that argument forthrightly:

> "The intrusion here is not only more immediate, its impact is greater." (J.S. 12a)

*Appellant's brief notes that physicians have filled out the forms under team names to avoid athlete identification. (Appellant's brief, p. 30).

The testimony of patients as to their fear is evidence of this. The recent history of governmental abuse connected with wire-taps and break-ins do not reassure citizens that their records are in safe hands, particularly where by pushing a single button the state can quickly compile a personal drug record. The seriousness of the intrusion is found in the testimony of one doctor who testified that with certain patients he had stopped prescribing Schedule II drugs because of the filing requirement.*

However, appellees do not rely upon a standard of strict scrutiny. Whatever the standard of review, even a rational basis test,** this massive cataloguing of patient names does not meet constitutional standards. The findings of fact of the Court below summarized in Section I of the argument show injury to patients and no gain whatever to the state from the inclusion of name on the centrally filed form. Those seeking drugs for illicit

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*He testified:

> "Mainly the schizo-affected disorders who are prone to suspicion and to have one act as a putative arm of the government in a situation like that provokes all kinds of anxiety, even delusions, and if we can avoid the use of drugs in that situation, we try to." (155a)

**Urged upon this Court by Appellant. (Brief p. 22) McGowan v. Maryland, 366 U.S. 420.



purposes can easily circumvent the system by the use of false names. Forgeries and stolen prescriptions are revealed not by reference to names but by tracing prescription numbers and matching them with reports submitted by doctors. As summarized by the three-judge Court, after trial:

> "The state prescription form program provides for issuing serially numbered prescription forms to physicians. Each doctor prescribing and each pharmacist dispensing any Schedule II drugs are given a DEA number. They, therefore, are readily identifiable. The state can promptly determine the quantity of drugs prescribed and dispensed by particular physicians and pharmacists. Over-prescribing or dispensing, forgeries and thefts can be detected. Having the name of the person receiving the drugs on the state's form adds nothing." (JS 11a)

Where the inclusion of name adds nothing it is irrational and offensive to permit the vast compilation of patient names in a state computer. It is also constitutionally impermissible.*

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*The appellant is unable to cite a single instance of illegal drug distribution or use revealed by the existence of patients' names on the centrally filed prescription. The requirement, then, appears premised on the conjecture that it may have occasional investigative utility. (Appellant's

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However, appellees urge that this area of intimate human activity - the doctor-patient relationship and the need for medical

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brief p. 30 points to one example where information could be sought through use of the centralized information.) Appellees do not deny that if citizens were required to report all activity to government prior to engaging in it, government could better account for activity, criminal and non-criminal. But such surveillance is incompatible with our "concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937). Efficiency is not a value which overrides the interest in personal liberty. As stated by Justice White in Stanley v. Illinois, 405 U.S. 645, 657 (1972), favorably cited in Cleveland Board of Education v. La Fleur, 414 U.S. 632, 648 (1974):

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy

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treatment - necessitates a more demanding review than the test of mere rational basis. In the past this Court has applied standards more strict than mere rationality yet less precise than strict scrutiny.* As Justice Marshall suggested in his dissent in San Antonio Independent School District v. Rodriguez, 411 U.S. 1(1973), in the context of equal protection analysis, there appears to have been a spectrum of levels of scrutiny:

> "A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications depending, I believe, on the constitutional and societal importance of interests adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." (at 99)

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> that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

This cumbersome system would hardly be termed efficient since as it has produced no yield. However, appellant's argument that it may result in some greater efficiency does not establish its constitutionality.

*CF discussion of middle level scrutiny, Comments, Constitutional Law, The Right To Privacy, 50 N.Y.U.L. Rev. 1149 (1976).

Justice Harlan, in his dissent in Shapiro v. Thompson, 394 U.S. 618 (1969), where the majority applied the strict scrutiny test, developed a balancing test. Finding that "the right to travel interstate is a 'fundamental' right" (394 U.S. at 671) having its source in the due process clause, and finding also a strong state interest in preventing welfare fraud (at 673), he continued:

> "The next question is the decisive one: Whether the governmental interests served by residence requirement outweigh the burden imposed upon the right to travel."

Similarly, a test of "careful scrutiny" was applied by the three-judge Court in Population Srvs. Int'l v. Wilson, 398 F.Supp. 321, (S.D.N.Y. 1975) appeal pending sub non Carey v. Population Services Int'l. 44 U.S. L.W. 3162, to the question of a state statute limiting a minor's access to contraceptives:

> "The Due Process Clause requires therefore, that the Court carefully scrutinize each provision of the statute to determine whether, as drafted, it is in fact sufficiently related to a state interest to justify its infringement of the right at stake." (at 331)

The Court assumed the state's right to regulate the morality of minors, but found no showing that the policy actually promoted that interest and found evidence of substantial harm from the policy. As a result, the statute was found unconstitutional.



The decision of this Court in Danforth, supra, concerning records further indicates a spectrum of review. The Court sustained recordkeeping even in the first trimester. In the words of Justice Blackmun, "Recordkeeping of this kind, if not abused or overdone, can be useful to the state's interest..." (at 5205). These records fell within "permissible limits."

Appellees then do not rely on the application of strict scrutiny. They do urge that the application of a standard of mere rationality to the question of individual liberty, the need for individual autonomy and anonymity in the doctor-patient relationship, would have a damaging impact on fundamental rights. Such a step would open the door to frightening intrusion by ever more subtle state surveillance. This Court can -- as the three-judge Court did here -- allow the state to seek its legitimate interest, but must allow trial courts to be vigilant to see that the means used have the precision of a scalpel rather than an axe. Where individual liberty is involved, vigilance is always necessary and "precision of regulation must be the touchstone." NAACP v. Button, 371 U.S. 415, 438 (1963). Here precision was lacking and the three-judge Court carefully narrowed the statute.

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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